IN THE LABOUR COURT OF LESOTHO **LC/REV/48/08**
A0970/07

HELD AT MASERU

IN THE MATTER BETWEEN

MONAHALI CONSTRUCTION (PTY) LTD **APPLICANT**

AND

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION **1ST RESPONDENT**
THABANG NQAKA **2ND RESPONDENT**

JUDGMENT

Date : 28/04/09
Review – Where Arbitrator has exercised the discretion to award compensation as provided by the Code the Labour Court will not interfere with that discretion unless it was not judicially exercised – Compensation – It is irregular for Arbitrator to arbitrarily award higher compensation than claimed by applicant without affording parties a hearing on the need to increase the amount claimed – Remittal – Parties requested the Court not to remit the case for evidence to be taken on single point of mitigation. The Court granted request after satisfying itself that no prejudice will be suffered by either side – Award of Arbitrator confirmed with modification on quantum.

1. This is a review application arising out of the award of the Directorate of Dispute Prevention and Resolution (DDPR) per Arbitrator Molapo-Mphofe, dated 5th April 2008. In her award the learned Arbitrator found that the 2nd respondent had been unfairly dismissed and awarded him ten months salary as compensation as well as certain monies in lieu of leave not taken and severance pay.

2. The facts are brief and are gathered from the evidence of the 2nd respondent. He testified that he was employed by the applicant company as a truck driver on the 18th August 2005. He earned M1,500-00 a month. His duty was primarily to deliver material to applicant company's various construction sites.

3. On the 29th September 2007, he was instructed by the Managing Director to deliver construction material to sites at Mpharane and Tsikoane both in the Leribe district. He loaded the material on the 29th, but only proceeded to deliver it the following day. He safely delivered at Mpharane site and offloaded material belonging to that site. He then proceeded to Tsikoane. As he turned to the right at Mpharane junction, another truck which was coming from behind attempted to overtake him and crashed into his truck in the process.

4. As is the procedure the accident was reported to the Police and the Managing Director of the applicant in Maseru. The Police came and did what they had to do in preparation for a criminal case of negligent and reckless driving. The Managing Director for his part directed that the damaged truck be removed to his site at Tsikoane which was done.

5. The following day which was a Friday, applicant reported to the office. He testified that his boss seemed not interested to speak to him. He called a clerk by the name of Lerato, gave her 2nd respondent wages to give to him. Thereafter the Managing Director attempted to leave the office without saying a word to 2nd respondent. The latter said he insisted to speak to him and gave him the phone numbers of the Police officer handling the case. After he phoned and talked to the Police officer, he came to applicant and conceded that there was nothing applicant could do in the circumstances to avoid the accident happening.

6. The following Monday, 2nd respondent came to work as usual. It was then that the Managing Director told him "that he was canceling the transport so I better look for another job for myself then asked me to leave." 2nd respondent testified that he left and that was his last day at work.

7. The Managing Director was afforded the opportunity to cross-examine the 2nd respondent. He did so, but did not shake his evidence even in the slightest degree. When he gave his own testimony he related a parallel story, which he never suggested to the 2nd respondent during cross-examination. He conceded that 2nd respondent came to ask for a job on the 18th August as he testified.

8. The Managing Director testified that he was concerned that employing 2nd respondent might cause conflict between him and 2nd respondent's previous employer whom he said is his neighbour. He stated that he asked him to bring a reference letter as well as his driver's licence so as to satisfy himself about the reason for 2nd respondent's separation with his previous employer.

9. He testified further that 2nd respondent pleaded with him to give him a job. He told him that he did not have a vacancy at the construction company especially because he did not have necessary documents. He stated further that he told 2nd respondent that he was going to offer him a piece job and give him M100-00. He did not say whether this was a daily, weekly, fortnightly or monthly remuneration. He concluded by stating that the 2nd respondent was never his employee. As we said all this came for the first time when the Managing Director testified. None of it was suggested to the 2nd respondent during cross-examination. All the questions put to him under cross-examination served to confirm his (2nd respondent) version of events.

10. After hearing evidence on both sides, the learned arbitrator concluded that the 2nd respondent was an employee of the applicant. She further concluded that 2nd respondent was unfairly dismissed following the accident that he had at Mpharane. She rejected outright the Managing Director's testimony that 2nd respondent was not dismissed and that he left of his own. She awarded 2nd respondent ten months salary as compensation.

11. The 2nd respondent had also claimed severance pay and accrued leave. The learned Arbitrator concluded that these claims were not denied. She proceeded to award them to the 2nd respondent in terms of his prayer. In all 2nd respondent was awarded M18,046-16 representing ten (10) months salary as compensation as well as severance pay and accrued leave.

12. Against these findings the applicant sought the intervention of this court by way of review on the following grounds:
    (a) There was no evidence before the 1st respondent of actual financial loss suffered by the 2nd respondent.
    (b) There was no proof that the loss was caused by the dismissal.
    (c) The amount of compensation awarded is not foreseeable and is therefore remote or speculative.
    (d) The award does not endeavour to place the 2nd respondent in monetary terms in the position which he would have been had it not been for the dismissal.
    (e) There is no evidence on efforts taken by the 2nd respondent to mitigate his damages.
    (f) There is no evidence that the applicant was the employee of the 2nd respondent.

13. In motivating his grounds of review, Mr. Mohaleroe for the applicant contended that the learned Arbitrator failed to apply her mind to the guidelines on assessment of compensation as enunciated in Ferodo (Pty) Ltd .v. De Ruiter (1993) 14 ILJ 974 at 981. The guidelines are indeed a guide. They are not an inflexible package which must be followed at all times. Failure to follow them may in given circumstances give rise for a ground of appeal but certainly not review.

14. In his submissions Mr. Setlojoane on behalf of the 2nd respondent argued that it is irrelevant for our purposes whether the Arbitrator followed the guidelines or not. What is important is whether the compensation awarded is just and equitable. We are in full agreement with this submission. For purposes of review, an important consideration is whether the Arbitrator or this Court has awarded what it considers just and equitable in

accordance with section 73(2) of the Labour Code Order 1992 (the Code).

15. The first and the second ground of review can justifiably and fairly be treated as one ground. They refer to evidence of loss and proof that the loss was occasioned by the dismissal. These grounds are misconceived in as much as they confuse the contractual claim which this matter is concerned with; with a dilictual claim of damages under the common law. The present claim is a statutory claim based on contract and the compensation to be paid is governed by section 73 of the Code. There is absolutely no need to apply the foreseeability test; when the statute vests a discretion in the presiding officer which as we know must be judicially exercised. Once the Arbitrator has exercised the discretion vested in her by the law, that discretion may not be interfered with by this court unless it is shown that it was improperly exercised, which is not the case in casu.

16. Mr. Mohaleroe contended further that the award does not endeavor to place 2nd respondent in monetary terms in a position he would have been had it not been for the dismissal. We repeat that this contention relates to the exercise of a discretion that the law vests in the learned arbitrator. In the absence of an attack on the exercise of that discretion that it was not properly exercised, this court has got no right to interfere. This ground like those that preceded it cannot succeed.

17. Another ground of review was that there was no evidence that the applicant employed the 2nd respondent in as much as the Managing Director of the applicant said 2nd respondent was employed by him personally and not the company. The evidence of the 2nd respondent at the arbitration that he was an employee of the applicant was not challenged. The Managing Director himself conceded that on the day that 2nd respondent had the accident he was delivering construction material for the sites.

18. The Managing Director's testimony that he employed applicant personally and not the company was rightly rejected by the learned Arbitrator. It was clearly a fabrication. Even the allegation that he gave 2nd respondent M100-00 was soon proved false when he had to concede under cross-examination that 2nd respondent earned M1,500-00. He (MD) conceded that 2nd respondent applied for a job at the office and that even the payments he received were made at the office. The totality of this evidence point to one thing that 2nd respondent was indeed an employee of the applicant.

19. The last two grounds of review are on a totally different footing from those we have dealt with so far. The first of these two was that the award of the learned Arbitrator is speculative. Even though Mr. Mohaleroe had not expounded on this ground, the Court referred Mr. Setlojoane for the 2nd respondent to the ten months compensation awarded by the learned arbitrator and invited him to compare it with the claim of the 2nd respondent which is at page 5 of the transcribed record.

20. At pages 4-5 of the record the learned arbitrator asked the 2nd respondent the following questions:

> ***"Arb. :*** *You believe you were unfairly dismissed, what would you like us to do for you?*
> ***"2nd resp. :*** *All I want is what is due to me.*
> ***"Arb. :*** *You say you were never given leave and also was given only salary at dismissal. In trying to improve the situation what would you ask for?*
> ***"2nd resp. :*** *I believe compensation would be good.*
> ***"Arb. :*** *How much exactly are you asking for?*
> ***"2nd resp.*** *: My salary for six months.*
> ***"Arb.*** *: How much exactly is that?*
> ***"2nd resp.*** *: That will be M9,000-00.*

21. It is common cause that contrary to this stipulated quantum, which was not even disputed by the representative of the applicant, the learned Arbitrator awarded M15,000-00 representing ten months salary. No attempt was made by the learned Arbitrator to justify how and why she came to award a

higher amount than that pleaded by the 2nd respondent and not opposed by the applicant. Immediately when he saw this discrepancy Mr. Setlojoane conceded that the learned Arbitrator's award of ten months was irregular in as much as it was arbitrary and to use applicant's terminology speculative.

22. If the departure from the amount claimed by the complainant and admitted by the defendant was at all necessary, it ought to have been justified by evidence, which ought to have been extracted from the litigants themselves. In other words they should have been invited to comment on why the quantum should not be increased to the level the learned arbitrator considered desirable. Failure to do so rendered the compensation arbitrary and subject to the interference of this Court.

23. The other ground was that no evidence was adduced to establish the efforts taken by 2nd respondent to mitigate his loss in terms of section 73(2) of the Code. Once again this point was wisely conceded by Mr. Setlojoane for the 2nd respondent. He however went further to ask the Court to invite the 2nd respondent to give that evidence so that the matter does not need to be referred back to the DDPR for evidence to be taken on just that point. At that point Mr. Mohaleroe for the applicant asked for a brief adjournment to enable him to consult with client.

24. Upon resumption of the hearing Mr. Mohaleroe reported that his instruction is that he should withdraw the request to have the matter remitted for evidence to be taken on the narrow issue of mitigation. His further instruction was to accept the request made by Counsel for the 2nd respondent that this Court proceed to hear evidence on mitigation. The general principle in review proceedings is that if a review is successful, the review court will:

> *"generally refer the matter back to the particular body entrusted by the legislature with certain or special powers rather than make the decision itself. It will not do so when the end result is a foregone conclusion and a reference back will merely waste time, when a reference back would*

> *be an exercise in futility, or when there are cogent reasons why the Court should exercise its discretion in favour of the applicant and substitute its decision for that of the respondent."* (See Herbstein and Van Winsen, The Civil Practice of The Supreme Court of South Africa; 4Ed. p.959).

25. This approach was followed by the learned Goldstone J in Traub .v. Administrator of the Transvaal & Others (1989) 10 ILJ 9 at p.31F. In casu, it would take the learned Arbitrator a single question to enquire from 2nd respondent what steps he had taken to mitigate his loss in order to satisfy the requirements of the Code on mitigation. This is what both sides ask this Court to do in order to avoid any further delay in reaching finality of this matter. We accepted the request after considering that no prejudice would result if we allow the 2nd respondent to give evidence on the narrow issue of mitigation.

26. In his testimony 2nd respondent stated that after his dismissal by the applicant he applied for work at Thescons and at Sigma construction. Both these applications were not successful. He later applied and got a job at Morning Star Construction in May 2008. This was after the DDPR had handed down its award in this matter. It follows that the earnings of this job could not have been taken into account by the DDPR as 2nd respondent had not yet found a job at the time his case was concluded.

27. Under cross-examination it was put to him that he did not do enough to find alternative work when his applications at Thescons and Sigma did not succeed. He disagreed. Asked what he did, he said he sold 2nd hand clothes during the period. He stated that he bought a bale for M400-00 and made an overall profit of M1,200-00. Asked how else he supported his school going kids, he said his parents used to help him.

28. In his closing arguments Mr. Mohaleroe submitted that the Court should take into account the assistance that 2nd respondent got from his parents. He stated further that the M1,200-00 that 2nd respondent allegedly made is questionable when regard is had to what the stock caused him. He

concluded by submitting that 2nd respondent was evasive and untruthful regarding the other sources particularly the assistance from parents and that should weigh against him.

29. As Mr. Setlojoane correctly pointed out, there was no sign of evasiveness or untruthfulness in the manner the 2nd respondent answered the questions. It is correct that he did not right away proffer the assistance he got from his family. We however discern no attempt at hiding the truth there because that assistance is not income which can be used as a mitigating factor to the amount of compensation to be paid. If any thing it is sufficient evidence to show that 2nd respondent was really experiencing hardship as a result of the loss of his job.

30. The failure to disclose that he sold clothes was clearly brought about by the manner his counsel led him in chief. His examination was centred on salaried employment. However, the cross-examination went beyond that as indeed it is free to go wide and wild as long as it remains relevant. In answer to that question that extracted the information that he sold clothes, the 2nd respondent was very relaxed and was giving the information freely. It could not justifiably be said he was trying to hide anything. We therefore do not agree with the suggestion that he was evasive or in any way untruthful.

31. Mr. Mohaleroe contended further that the amount of M1,200-00 that 2nd respondent allegedly made is questionable. He however advanced no basis upon which he wanted the Court to question the income except that the capital did not justify the profit earned. On the contrary we are of the view that the amount spent on a bale which is a small amount by all accounts justifies the negligible profit earned over the period. It is to be understood that these were 2nd hand clothes which should have been sold for very small amounts. In the premises the 2nd respondent has clearly taken steps to mitigate his damages, and the amount proved is M1,200-00 he earned from the sale of clothes.

32. At the start of his submissions Mr. Setlojoane for the 2nd respondent recorded that from the papers and indeed in submissions before the court, the applicant is not challenging the award of the learned Arbitrator on leave pay and severance pay and that applicant is only concerned with compensation. He requested the Court to leave that aspect of the award unaffected. This was not denied by Mr. Mohaleroe for the applicant. It follows that the award of the learned Arbitrator that 2nd respondent be paid M1,661-54 for accrued leave and M1,384-62 for severance pay is confirmed.

33. Whilst we found that there is no merit in the majority of the grounds raised, there is however merit in the last two grounds we dealt with. First, the learned Arbitrator granted an award in excess of what the complainant had prayed for which prayer had not been opposed by the defendant. That was irregular as such the award of 10 months granted by the learned Arbitrator and the amount of M15,000-00 are reviewed , corrected and set aside and in its place substituted by 6 months compensation which translates to M9,000-00 payable to the 2nd respondent by the applicant.

34. In accordance with the requirements of section 73(2) the 2nd respondent sought to and succeeded to mitigate his damages in the amount of M1,200-00 through the sale of clothes. In the circumstances the amount of M9,000-00 is lowered by the said amount of M1,200-00 thus leaving the compensation due and payable to the 2nd respondent at M7,800-00. When the leave pay and the severance pay are added to this figure the total amount payable to the 2nd respondent by the applicant is M7,800-00 + M1,661-54 + M1,384-62 = M10,746-16.

35. Accordingly, the applicant is ordered to pay 2nd respondent the amount of M10,746-16 within 30 days of the handing down of this award. Payment shall be made at the DDPR headquarters in Maseru as initially ordered by the DDPR. Both parties have partly succeeded in this review application. It is only fair in the circumstances that each party bears its own costs. It is so ordered.

THUS DONE AT MASERU THIS 14th DAY OF MAY 2009

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE **MEMBER**	**I CONCUR**
M. MOFELEHETSI **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MR. MOHALEROE**
FOR RESPONDENT:	**ADV. SETLOJOANE**